

HON. JUSTIN L. QUACKENBUSH

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JIN ZHU,

Plaintiff,

v.

NORTH CENTRAL EDUCATIONAL
SERVICE DISTRICT – ESD # 171,

Defendant.

NO. 2:15-CV-183 JLQ

**DEFENDANT'S FIRST
SUPPLEMENTAL PROPOSED
JURY INSTRUCTIONS**

COMES NOW Defendant North Central Educational Service District # 171
(the District), by and through counsel, and submits these first supplemental
proposed jury instructions.

DATED this 15th day of August, 2016.

JERRY MOBERG & ASSOCIATES, P.S.

s/ Jerry J. Moberg

JERRY J. MOBERG, WSBA No. 5282

Attorneys for Defendant North Central ESD # 171

I. INTRODUCTION

On Aug. 1, 2016 the District filed Defendant's proposed jury instructions. (ECF 57.) This submission comments on those proposed instructions. This submission also sets forth supplemental proposed instructions.

Comments on Defendant's initial proposed jury instructions

The District's initial proposed jury instructions were filed before the Court ruled on the District's motion for summary judgment. The jury instructions to be given will depend upon how the Court rules on the District's motion for summary judgment.

Proposed Instruction ## 21 and 24 – These instructions should not be given if the Court dismisses Plaintiff's federal disparate treatment claim.

Proposed Instruction ## 25, 26, 27 and 28 – These instructions should not be given if the Court dismisses Plaintiff's state disparate treatment claim.

Proposed Instruction ## 29, 30 and 31 – These instructions should not be given if the Court dismisses Plaintiff's state "blacklisting" claim.

Proposed Instruction ## 33, 34 and 35 – These instructions should not be given if the Court dismisses Plaintiff's state Public Records Act claim.

II. SUPPLEMENTAL PROPOSED INSTRUCTIONS

INSTRUCTION NO. 36

Evidence was presented to you in the form of answers of one of the parties written interrogatories submitted by the other side. These answers were given in writing and under oath, before the actual trial, in response to questions that were submitted in writing under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

(9th Circuit Model Instruction No. 2.10.)

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INSTRUCTION NO. 37

As to Plaintiff's federal racial discrimination claim, that his race and national origin was a motivating factor in the Defendant's decision to not hire him, the Plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. The Plaintiff was not hired by the Defendant; and
2. The Plaintiff's race and national origin was a motivating factor in the Defendant's decision to not hire the Plaintiff.

If you find that the Plaintiff has proved both of these elements, your verdict should be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove either of these elements, your verdict should be for the Defendant.

(9th Circuit Model Instruction No. 10.1C.) [NOTE – This instruction should not be given if the Court dismisses Plaintiff's federal disparate treatment claim.]

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INSTRUCTION NO. 38

As to Plaintiff's federal retaliation claim, the Plaintiff seeks damages against the Defendant for retaliation. The Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. The Plaintiff engaged in or was engaging in an activity protected under federal law, that is he filed a lawsuit against Waterville School District, his former employer;

2. The employer subjected the Plaintiff to an adverse employment action, that is Defendant declined to hire him; and

3. The Plaintiff was subjected to the adverse employment action because of he filed a lawsuit against Waterville School District, his former employer.

If you find that the Plaintiff has proved all three of these elements, your verdict should be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove any of these elements, your verdict should be for the Defendant.

(9th Circuit Model Instruction No. 10.3.) [NOTE – This instruction should not be given if the Court dismisses Plaintiff's federal retaliation claim.]

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INSTRUCTION NO. 39

As to Plaintiff's state retaliation claim, it is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination on the basis of national origin and race.

To establish a claim of unlawful retaliation by ESD # 171, Mr. Zhu has the burden of proving each of the following propositions:

(1) That Mr. Zhu was opposing what he reasonably believed to be discrimination on the basis of national origin and race or was participating in a proceeding to determine whether discrimination or retaliation had occurred; and

(2) That a substantial factor in the decision not to hire was the Plaintiff's opposition to what he reasonably believed to be discrimination or retaliation or participating in a proceeding to determine whether discrimination had occurred.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Mr. Zhu on this claim. On the other hand, if any one of these propositions has not been proved, your verdict should be for ESD # 171 on this claim.

Mr. Zhu does not have to prove that his opposition was the only factor or the main factor in ESD # 171's decision, nor does Mr. Zhu has to prove that he would not have been denied the jobs for which he applied but for his opposition.

(6A Wash. Practice WPI Civil 330.05.) [NOTE – This instruction should not be given if the Court dismisses Plaintiff’s state retaliation claim.]

INSTRUCTION NO. 40

“Willfully” means a conscious, intentional act done knowing and according to a purpose. “Willfully” means that the Defendant made the statement voluntarily and purposely with knowledge that the Defendant’s making of the statement was unlawful.

(*United States v. Doe*, 136 F.3d 631, 635 (9th Cir. 1998); *United States v. Smith*, 2016 WL 4137634, *11 n. 27 (9th Cir. 2016). [NOTE – This instruction should not be given if the Court dismisses Plaintiff’s state “blacklisting” claim.]

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INSTRUCTION NO. 41

“Maliciously” means that state of mind which actuates conduct injurious to other without lawful reason, cause or excuse. “Malice” or “maliciously” means an evil intent, wish or design to injure another person.

(*United States v. Doe*, 136 F.3d 631, 635 (9th Cir. 1998); 11 Wash. Practice WPI Criminal 2.13.) [NOTE – This instruction should not be given if the Court dismisses Plaintiff’s state “blacklisting” claim.]

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to:

Matthew Z. Crotty, attorney for Plaintiff
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Michael B. Love, attorney for Plaintiff
mike@michaellovelaw.com

DATED this 16th day of August, 2016 at Ephrata, WA.

JERRY MOBERG & ASSOCIATES, P.S.

s/ Jerry J. Moberg

JERRY J. MOBERG, WSBA No. 5282
Attorneys for Defendant